The Court of Appeal for Bermuda

CIVIL APPEAL Nos. 2 and 6 of 2019

B E T W E E N:

WF (INTERVENER) (No.2)

Intending Appellant

MAHESH SANNAPAREDDY

1st Applicant

BERMUDA HEALTHCARE SERVICES

2nd Applicant

BROWN DARRELL CLINIC LIMITED

3rd Applicant

- v -

THE COMMISSIONER OF POLICE

1st Respondent

-and-

THE SENIOR MAGISTRATE FOR BERMUDA

2nd Respondent

Before: **Clarke, President**
Kay, JA
Smellie, JA

Appearances: Mark Pettingill and Victoria Greening, Chancery Legal Ltd., for the Intending Appellant;
Delroy Duncan, Trott & Duncan Ltd., for the 1st – 3rd Applicant
Mark Diel and Dantae Williams, Marshall Diel & Myers Ltd., for the Respondent

Date of Hearing: **Tuesday, 11 June 2019**
Date of Judgment: **Friday, 21 June 2019**

JUDGMENT

CLARKE P:

1 This is an application by WF, the intervener, for a stay, pending appeal, of the decision of Subair Williams J dated **14 February 2019**. An application for such a stay was made to her and refused on **4 March 2019**. Mr Pettingill and Ms Greening of Chancery Legal ("CL") appear on behalf of WF to make the application.

2 The history behind this application is somewhat lengthy and has been set out in greater detail in the judgment which we have just handed down in relation to the question as to whether CL is conflicted in acting for WF and those whom she represents.

3 The Bermuda Police Service ("BPS") has been carrying out an investigation into the affairs of the 1st Applicant, whom I will call Dr Reddy, and the 2nd and 3rd Applicants for some time. The 2nd and 3rd Applicants are the proprietors of clinics in Bermuda (the BHC and BD clinics) and are owned by Dr Brown, the former Premier, and his wife.

4 The reason for the investigation is that the BPS suspects that unnecessary diagnostic services have been ordered for patients of the two clinics the cost of which has been charged to them or their insurers.

5 On **2** and **10 February 2017** the Senior Magistrate issued two Special Procedure Warrants ("SPWs") authorising the BPS to search the BHC and BD clinics. The Magistrate had before him an Information (with a schedule of patient names) and a Dramatis Personae.

6 These warrants were executed on Saturday **11 February 2017** at about midday. On the same day the Applicants, represented by Trott & Duncan Ltd ("TD"), sought leave to issue the present judicial review proceedings.

7 On **11 February 2017** Hellman J ordered the return of the files seized by the BPS to the clinics by 8 a.m. on Monday 13 February. The order allowed the BPS to copy the seized material but prevented them from reviewing its content.

8 On **13 February 2017** the Applicants filed an amended application for leave to apply for judicial review. There was a court hearing before Hellman J to determine directions on the execution of the SPWs. The court made an order prohibiting the BPS from reviewing and/or utilising the seized material for the purpose of their investigation pending the outcome of the application for leave to apply for judicial review or further order. The order permitted the copying of any uncopied material subject to various conditions.

9 On **14 March 2017** there was a public meeting at the Cathedral Hall in Hamilton attended by over 100 patients of the BD clinic, who voiced their concern about the seizure of their medical files.

10 On **13 April 2017** the Applicants filed the final version of their application for leave to apply for judicial review.

11 On **15 June 2017** Hellman J gave the Applicants leave to apply for judicial review on the basis of the final version of their judicial review application. The application sought, inter alia, an order quashing the decision of the Senior Magistrate to grant the SPWs, a declaration that the searches were unlawful, directions that the items seized be returned and a continuation of the interim relief granted on 13 February 2017.

12 Thereafter the Applicants appear to have done nothing to advance their judicial review claim for nearly a year. At the same time the BPS appears to have done nothing to secure access to the documents seized.

13 By a summons dated **11 June 2018** ("the Access Summons") Marshall, Diel & Myers ("MDM"), on behalf of BPS, sought access for the BPS to the files seized. What was sought was that an independent agency from overseas should store the files on a secure server. and they would then be inspected by two

independent medical experts. The Second Affidavit of Mr Briggs, filed in support, indicated that the BPS sought to agree a protocol, a version of which was filed with the summons, to keep the identity of the patients hidden through the use of a numbering key.

14 WF is an intervener in the judicial review proceedings. She is a patient at the BD clinic, and one of those whose files were seized. On **22 November 2018** an Order was made by which WF was permitted to intervene in the proceedings, representing a significant number of patients.

15 On **29 November 2018** and **4 January 2019** MDM for the BPS wrote to CL in relation to the Access Summons, seeking to secure agreement on a draft protocol which would facilitate access by the BPS to the medical files. MDM indicated that consideration would be given to all reasonable suggestions. The letter of 29 November 2018 enclosed a copy of the draft protocol which had previously been shared with the Applicants.

16 On **14 January 2019** CL wrote to MDM to say that they would:

> "*not agree, nor sanction any attempt by you to use [the medical files], period. These files belong to our clients, it is our view that you came by them illegally and we want them back. We have no confidence in the integrity of the police in this regard.*"

17 On **12 February 2019** the parties' counsel appeared before Subair Williams J. She refused an application by the Intervener for an adjournment of the Access Summons pending the determination of a Contempt Summons issued by the Intervener dated **25 January 2019**, alleging that the BPS was in breach of the Court Order of 13 February 2017. (That contempt has subsequently been held not proven). She also refused to adjourn the Access Summons pending the determination of a summons filed by the Intervener on 11 February 2019 seeking disclosure of documentation in the possession of the BPS.

18 On this occasion, i.e. **12 February 2019,** Mr Lynch QC for the Intervener submitted that the Court should adjourn the hearing on the basis that the Court

should hear all of the pending applications simultaneously. In particular the Court should not hear the Access Summons application prior to hearing the substantive judicial review application. In the event Subair Williams J adjourned the Access Summons to 14 February 2019.

19 On **13 February 2019** a meeting took place between the parties (at which Mr Lynch QC represented the Intervener, and Mr Delroy Duncan the Applicants) to go through the draft protocol. It is the case of MDM for BPS that the protocol was then agreed save for an issue as to the number of files that were to be the subject of it and whether they should be 50 or 75 in number.

20 On **14 February 2019,** Subair Williams J ordered that the BPS should have access to the materials seized under the SPWs in the manner set out in the protocol ("the Access Order"). The protocol has two parts: the first deals with patient's records and the second with electronic material such as bank statements.

21 Mr Lynch QC for the Intervener confirmed that the parties had achieved an agreed protocol, without prejudice to his primary objection to the making of any protocol at all: see para 78 of the Ruling dated 1 March 2019 referred to below. His submission was that the Court ought not to permit police access to the seized material until a ruling was passed on the lawfulness of the search warrants and their execution. The judge declined to make any findings on the issues pleaded under the substantive judicial review application.

22 In essence the protocol provided for the BPS to upload copies of 75 seized medical files to a Secure Server which could only be accessed by a unique security code that was not to be disclosed to the BPS. Not more than 2 Independent medical experts were to have remote access to the selected files which they were to review and in relation to which they were then to provide expert reports. It is that order which WF seeks to stay.

23 On **21st February 2019** the attorneys for the BPS gave a verbal undertaking that the BPS would not proceed with Part 1 of the protocol (i.e. access the patients' files) until the outcome of an application for a stay of the ruling of 14th February.

24 On the same day – 21 **February 2019** – CL filed a Notice of Motion for leave to appeal to the Court of Appeal the decision of the Supreme Court of 14 February 2019. That notice of motion had four grounds. The first ground was that judge was said to have erred in law in refusing to adjourn the hearing until after the Intervener was in receipt of full disclosure in the case. The second ground was that the judge was in error in refusing the Intervener's application to adjourn the hearing until after the application of the Applicants and the Intervener to judicially review the grant and execution of the SPWs. The third ground was that the judge had erred in law when she allowed the BPS access to 75 of the medical files.

25 The application for leave to appeal was heard on **26 February 2019**.

26 On Monday **4 March 2019** a ruling was handed down by Subair Williams J, dated 1 March 2019, refusing leave to appeal and refusing a stay. The first ground of appeal was rejected on the ground that there was no reasonable argument for the Intervener that the non-disclosure of documents was the fault of anyone other than herself. The second ground was refused on the basis that there was no arguable reason why the Access Summons should be adjourned on the basis of a substantive judicial application which had not yet been filed with the Court. At this stage WF had, in November 2018, been joined as an intervener but not as an applicant.

27 The third ground of appeal, namely that the Judge erred in law when she allowed the BPS' application to access 75 of the medical files, was refused on the ground that no meritorious argument was raised which would have enabled the court to reasonably refuse the BPS proposed protocol. Since the judge had rejected the second ground and the protocol had been agreed as a protocol, subject to Mr Lynch's reservations, this conclusion was not wholly surprising.

28 On **18th March 2019** a notice of motion to a single judge of the Court of Appeal was filed by CL on behalf of the Applicants and the Intervener for leave to appeal to the Court of Appeal and for an enlargement of time for that purpose. The grounds of appeal were fourfold. The first was that the judge had erred in refusing to adjourn the Intervener's application until after the Contempt Summons. (This was not a ground in the notice of motion to the Supreme Court for leave to Appeal. It is in any event now irrelevant given that the Contempt Summons has been dismissed). The second was that the judge had refused the Intervener's application to adjourn the hearing of the Access Summons until after the judicial review had been heard and determined. The third was that the judge erred in law in allowing the BPS access to the 75 medical files contrary to the patients' consent. The fourth was that the judge erred when she allowed the BPS access to the files before the Protocol had been agreed and finalised.

29 The application was said to be an application by the Applicants and the Intervener, but in relation to ground 3, an application by the Applicants only. I do not, however, follow how CL, who did not act for the Applicants came to file a notice of motion on their behalf.

30 Noticeably no request was made to the Court of Appeal for a stay of the 14 February order which gave the BPS access to the seized documents. That is said to have been because the oral undertaking given on **21 February 2019** was understood (wrongly) by CL to be an undertaking not to access the documents until the determination of the appeal from Subair-Williams J's order of 14 February 2019. I do not understand how CL could have understood that to be the position and why, if they did so, they applied for a stay on 4 March 2019 and why, once that stay was refused, they did not immediately apply for a stay to the Court of Appeal. As it was an application for a stay was only made to the Court of Appeal on **18th June 2019**.

31 On **3 April 2019** the Intervener issued a Summons seeking the right to join the Applicants in their judicial review or, in the alternative, seeking the right to proceed independently in order to challenge (i) the lawfulness of the grant and execution of the SPWs as they relate to the patients' files; and (ii) the BPS'

decision to seize the medical files without the consent of the patients. That application has not yet been determined.

32 It is important to understand the process which has operated in respect of the documents relating to patients seized in February 2017 in accordance with the protocol. The documents were seized by the police. The BPS does not seek, itself, to physically review any patient files. The files were copied by the BPS (in hard copy) and the originals were returned to the clinics. BPS created its own numbering system in respect of the documents copied. The documents hard copied were sealed and the BPS had no further access to them. Scanned copies of 75 of the seized medical files were uploaded to a secure server set up by the National Crime Agency that can only be accessed by a unique security code to which the BPS does not have access. The medical files are prohibited from being printed or copied from the secure server save by no more than 2 independent medical experts who have access to the secure server and are allowed to print and make copies of the selected files. The medical experts have created a different numbering system, which is unknown to the BPS. The experts are to prepare reports. For that purpose, they will anonymise the details.

33 Paragraphs [5] and [6] of the Protocol provides:

> *"[5] The Medical Expert(s) shall independently review the Selected Files and provide their expert reports to the BPS containing their opinions on the Selected Files that they reviewed without collaborating between each other (if more than one Medical Expert) before the drafting of their respective reports.*
>
> *[6] The Medical Expert(s) shall preserve the confidentiality of the patients comprising the Selected Files. The Medical Expert(s) shall anonymise only the files in which the expert considers further investigation is required by redacting the names, addresses, telephone numbers, occupation and other material, including family history, that might lead to identification of the patient, save that in circumstances where such information is necessary for the purposes of the expert(s) opinion such information will remain unredacted, but only communicated to Counsel for the Applicants, Intervener and the Respondents who may within 7 days of receipt apply to the Court for directions in relation to the same."*

34 As is apparent from the summary I have given of these rather tortuous events, we are presently concerned with a number of somewhat unusual factors/circumstances.

35 First, an order allowing access to the seized material was made on 14 February 2019 i.e. four months ago. Since then the material has been accessed in accordance with the protocol for 4 months. We understand that 30 files have been sent to the experts who have already compiled some 16 reports.

36 Second, if a stay is granted, the BPS will probably not be able to have access to the files until November of this year at the earliest, when this court next sits and the leave application is due to be heard.

37 The result is that we are considering whether to grant a stay pending appeal without considering at the same time whether to grant leave to appeal. This is unsatisfactory. Matters have been even more complicated by reason of the fact that the conflict dispute and the order of Assistant Judge Kieran Bell of 2 May 2019 restraining CL from acting has raised the question as to whether Cl can act for WF and, if so for what matters. Agreement was reached that they could do so for the conflict dispute and for the stay application. But the question of whether they can appear on a leave application has not been addressed.

38 At the same time, it is common ground that the prospects of success on the leave application are relevant to whether a stay should be granted. And it is potentially relevant to any leave application to consider whether the application for judicial review has a reasonable prospect of success. That is an analysis which Subair Williams J declined to address.

39 WF seeks a stay pending the hearing of the appeal, upon the basis that if a stay is refused the appeal, it is said, will be rendered nugatory. The appeal seeks to overturn the order giving the BPS access to the files in accordance with the protocol. The contention is that the seizure and retention of the files was a breach of the patient's confidentiality and their right to privacy. If those experts

look at the files for another four months the confidentiality of those files will, it is said, in effect be lost. WF is not alone. She represents 152 patients who are concerned at the seizure of their highly sensitive and private medical information; so that there is a public interest at stake. There would, it is submitted, be a real injustice if those files continue to be looked at. The files should not be looked at until the lawfulness of their seizure has been determined. There is no urgency sufficient to justify or demand interim access before that question is determined.

40 In deciding whether or not to order a stay we have to balance a number of competing considerations.

41 The first is that what was seized under the SSWs are important records containing confidential details of the treatment of patients which were matters private to them. Cases of high authority have emphasised the importance of rights of privacy and confidentiality, both at common law and under the ECHR and, in Bermuda, the Constitution. There are authorities which indicate that before a witness summons is issued requiring the production of medical records the persons whose records they are will or may, need to be afforded the right to object. One example is **R v Crown Court at Stafford** [2007] 1 WLR 1534. In that case the records were the records of the alleged victim. Similarly, in **F v Scottish Ministers** 2016 SLT 359 a complainer in criminal proceedings was held to be entitled to be heard on the hearing of a petition by the accused person for recovery of her medical records; much of the decision relates to the question as to whether she should be entitled to legal aid.

42 There are, however, difference between those cases and the present. The documents in those cases were sought for use in public in a criminal trial; without any protocol or the like.

43 The second is that the investigation of a supposed crime is, itself, a matter of public interest.

44 The third is that WF and those whom she represents have not gone unheard or unlistened to. It is plain that the BPS has sought to reach agreement as to the terms of a protocol to protect confidentiality. Negotiations have taken place with the Applicants, and latterly WF. WF and those whom she represents were invited at an early stage to make observations about the proposed protocol and were told that any reasonable objections would be considered. As it is, the terms of the protocol, as a protocol, have been agreed.

45 CL, for WF, came to take the view that there should be no access to the material before the legitimacy of the seizure by the BPS has been determined. That is a view they were entitled to take; but it is unclear at present whether they are to be allowed to take up the running from the Applicants. WF is, at present only interveners, not applicants. The summons of 3 April 2019 is undecided upon. It is also important to recognize that there are two different questions: the first is as to the legitimacy or otherwise of the seizure; and the second is as to whether the patients' rights of confidence and privacy are being adequately protected. It is the latter which seems to me of particular significance at the present juncture.

46 The fourth consideration is the passage of time. As I have said it is four months since Subair-Williams J made her order. No application for a stay was made to the Court of Appeal until then. Whilst there is probably no irremediable prejudice to the BPS if investigations by the medical experts are put on hold for another 4 months, there is a public interest in progressing criminal investigations without delay. It is also to be noted that two years have elapsed since the Applicants were given leave to apply for judicial review. Whether or not that review proceeds and under whose auspices is itself uncertain. If no further work is to be done on the files until the outcome of the judicial review proceedings there may be a very long wait,

47 The fifth, and, as I have indicated, perhaps the most important consideration, is that it seems to me that the Protocol provides the necessary protection for the interest of the patients. This is not only because of its terms But Also because the effect of its operation is to transmogrify confidential information into data that lacks that character.

48 In **Regina v Department of Health ex parte Source Informatics Ltd [2001] QB 424** the English Court of Appeal held (allowing the appeal):

> *"…that a patient had no proprietorial claim to the prescription form or to the information it contained and had no right to control the way the information was used provided only that his privacy was not put at risk; that where a patient's identity was protected, it would not be a breach of confidence for general practitioners and pharmacists to disclose to a third party, without the patient's consent, the information contained in the patient's prescription form; and that, accordingly, the applicants were entitled to the declaration sought."*

49 It is convenient to set out the summary of that case contained in the leading work on Confidentially 3rd Edn, 11th Chapter – Medical Advisers Anonymization 11-008 to 11-010. Here the authors provide the following:

> *In R. v Department of Health, Ex p. Source Informatics Ltd,49 the Court of Appeal held that the applicant company committed no breach of confidence in purchasing information from the computerised prescription records of pharmacists and passing that information on to pharmaceutical companies, which used it for marketing purposes. Crucially, the information provided by the applicant was in anonymised form. Giving the only judgment, Simon Brown L.J. (as he then was) agreed with submissions, advanced on behalf of the General Medical Council, that patients could not be taken to have impliedly consented to the use made by the applicant of information relating to them. Nevertheless, he concluded:*
>
> > *"The concern of the law here is to protect the confider's personal privacy. That and that alone is the right at issue in this case. The patient has no proprietorial claim to the prescription form or to the information it contains. Of course he can bestow or withhold his custom as he pleases … But that gives the patient no property in the information and no right to control its use provided only and always that his privacy is not put at risk.*
>
> *The decision of the Court of Appeal has been criticised on the basis that it adopts too narrow a view of a patient's interest in preserving the confidentiality of medical information: a patient may object not only to the disclosure but also to the collateral use of such information. It is suggested that the Court of Appeal's*

> *decision was sound. Once information has been anonymised, the patient's legitimate interest in preventing its further disclosure or other use is limited, if it exists at all; in effect, the information no longer relates to the individual patient. It would be unfortunate if medical research of public importance were unnecessarily impeded by exaggerated sensitivities in respect of a patient's "ownership" of anonymised information.*

50 As is apparent there has been criticism of that decision as not reflecting more modern thinking and the importance of privacy and private life. I would, however, accept that if, to take the simplest of examples, the result of a scan (or the fact of the taking of a scan) is recorded in the name of X; and the identity of X is anonymised the fact that the scan took place on what has become an unidentified person (or its result) is not a breach of X's right of confidence.

51 At any rate, for present purposes, the protocol, whose terms have been agreed, provides sufficient protection of confidential information. I do not believe that the patients will have been unjustly treated if a stay is refused and further consideration by the medical experts takes place in accordance with the protocol. The **Personal Information Protection Act 2016** was not in force when the SSWs were issued. But it I had been, it seems to me that the BPS would have complied with the minimum requirements. Accordingly, taking all these matters into account, and weighing the relevant competing considerations, I do not regard it as appropriate to order a stay of the order of 14 February 2019. I do so on the understanding, as communicated to us, that, after any report from the experts is received by the BPS the basis of the protocol is that it cannot be further published or used without an application to the court.

52 I do not regard that as rendering any appeal nugatory. WF is at liberty to seek to persuade the Court of Appeal in November that Subair-Williams J was wrong and, if successful, to seek a stay of any continued use of the seized material (either in the form of the 75 files, or any further files, or any further use of the 75 files - for which permission is required under the protocol.

53 I cannot leave this ruling without commenting on the profoundly unsatisfactory circumstances in which we are having to give it. The hearing of this application was fixed last week for yesterday. The parties were required by Mr. Quallo, the Administrative Officer of the Court, to file their submissions by close of business on Tuesday and Wednesday respectively. The Appellant did so.

54 The Respondents caused a very substantial bundle of documents containing their submissions with documents in 35 tabs to be delivered to our rooms at, in my case, 11.10 pm on Wednesday. Whilst I appreciate and value this body of work, the utility of which was underscored by the exiguousness of the material produced by CL, this timing is simply intolerable. The purpose of providing material of this kind in advance is that the court can consider it carefully in waking hours. That is particularly important in a case such as the present where the course of events over some two years is complicated; and exactly what happened and when is not easy swiftly to appreciate. There seems to be developing in this jurisdiction a practice whereby it is thought not to matter how late in the day you produce the material provided you do so on the day specified (or more accurately night). This must stop.

55 It was made worse in the Respondents' case by the fact that in previous week their submissions on the conflict issue had been delivered to my room at about 9:22 p.m. That hearing itself indicated the difficulties that a court faces when a number of relevant documents are missing – a deficit which was helpfully made up by copies produced at short notice by Mr Duncan.

56 Accordingly the stay sought is refused.

KAY JA:

57 I agree

SMELLIE JA:

58 I, also, agree.

Clarke P

Kay JA

Smellie JA